STATE OF MICHIGAN

IN THE SUPREME COURT

* * * * * * * * * * * * * * * * * * * * * * * * * *

Appeal from the Court of Appeals, Holbrook, Jr., P.J., and Cavanagh and Meter, J.J. affirming the Kent Circuit Court, Donald A. Johnston.

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

vs.

CHRISTOPHER LAMAR HAWKINS,

Defendant-Appellee.

Supreme Court No: 120437

Court of Appeals No: 230839

Kent County Circuit Court No: 99-122537-FH

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# BRIEF OF DEFENDANT-APPELLEE

## ORAL ARGUMENT REQUESTED

Helen C. Nieuwenhuis (P41672)
Nieuwenhuis Law Offices, P.C.
The Loraine Building, Suite 404
124 East Fulton Street
Grand Rapids, MI 49503
(616) 451-2190

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## STATEMENT OF APPELLATE JURISDICTION

This matter is properly before the Court pursuant to the Court's Order dated April 30, 2002, granting Plaintiff-Appellant's Application for Leave to Appeal.

## COUNTER STATEMENT OF QUESTION PRESENTED

WHERE THE SEARCH WARRANT ISSUED IN DEFENDANT'S CASE VIOLATED STATUTORY LAW, PURSUANT TO MCL 780.653; MSA 28.1259, THE UNITED STATES' CONSTITUTION, AMENDMENT IV AND THE MICHIGAN CONSTITUTION, ARTICLE I, SECTION 11, MUST EXCLUSION OF THE EVIDENCE BE THE PROPER REMEDY?

Kent County Circuit Court says: "Yes."
Michigan Court of Appeals says: "Yes."
Plaintiff-Appellant says: "No."
Defendant-Appellee says: "Yes."

## COUNTER -STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The Defendant, Christopher Lamar Hawkins, was arrested on November 3, 1999 after he was stopped by police driving a vehicle near or at Horton Avenue and Griggs Street. A passenger in the vehicle, Jonathan Bowman, was file checked and released.

A search warrant for the upstairs apartment of 921 Humbolt Street, S.E. was issued and signed by the Honorable Michael Christensen on November 3, 1999. (8a) (All references to Appendix are referring to Appellant's Appendix.) Pursuant to the search warrant, the Grand Rapids Police Department searched the apartment and located cocaine and numerous weapons.

The search warrant dated November 3, 1999 listed the following as alleged probable cause to search the residence:

The following facts are sworn to by your affiant in support of the issuance of this warrant:

> 1. Your affiant received information from an informant on 10/14/99 that the resident of 921 Humbolt S.E. was involved in the sale of narcotics. The informant stated the residence is selling the controlled substance crack cocaine. The informant described the resident and seller of the controlled substance as "Chris", B/M, approx. 20, 5'8", 170 lbs, medium build/complexion, short hair.
>
> 2. Your affiant met with a reliable and credible informant on 11/3/99. Your affiant was advised that the informant had observed the controlled substance cocaine available for sale from the residence within the past 36 hours.
>
> 3. Your affiant was advised by the informant the entry door to the suspects apartment has been reinforced to delay a police entry.
>
> WHEREFORE, your affiant for the foregoing reasons does verily believe that evidence of further narcotics trafficking, proceeds of narcotics trafficking, and/or records/documents or other indicia of narcotics trafficking will be discovered within the above described premises and/or person(s). (10a)

A preliminary examination was held on Wednesday, November 17, 1999 before the Honorable Michael Christensen and continued on December 20, 1999. The defendant was bound over to stand trial on possession with intent to deliver cocaine, contrary to MCL 333.7401(2)(a)(iv); MSA 14.15 (7401)(2)(a)(vi); maintaining a drug house, contrary to MCL 333.7405(1)(d); MSA 14.15 (7405)(1)(d); felon in possession of a firearm MCL 750.224(f); MSA 28.421(6); two counts of receiving and concealing a stolen firearm, contrary to MCL 750.535(b); MSA 28.803(2); being a second drug offender, contrary to MCL 333.7413(2); MSA 14.15 (7413); and being a fourth felony offender, contrary to MCL 769.12; MSA 28.1084.

The defense filed a motion to quash, suppress and dismiss along with a brief in support on August 18, 2000. The prosecution filed a response to defendant's motion dated September 8, 2000. The defense filed a response to the prosecution's argument that the good faith standard should be applied.

A hearing on the motion to quash, suppress and dismiss was held on September 22, 2000. The Honorable Donald Johnston, III rendered an opinion and quashed the search warrant because it violated not only statutory law but, Michigan case and Constitutional law. (11a-24a) An order quashing, suppressing and dismissing defendant's case was executed and entered on September 22, 2000. (26a)

The defense maintained that the search warrant lacked adequate probable cause and lacked any evidence showing the informant to be reliable and/or credible. The

defense maintained that the warrant must be quashed and the case dismissed based on the U.S. Constitution, Michigan Constitution, statutes and case law.

The defense maintained that not only did the warrant lack adequate probable cause, the warrant also lacked any verifiable indication that the person who allegedly supplied the information was in fact reliable and credible. This is a violation of case law and MCL 780.653; MSA 28.1259. The defense argued the search warrant lacked adequate probable cause and lacks evidence of the alleged credibility or reliability of the informant. People v Russo, 439 Mich 584, 487 NW2d 698 (1992).

Based upon the ruling by the Honorable Donald Johnston III, the Court held that the warrant and seizure based on that warrant must be suppressed based on statutory, case and Michigan Constitutional law. The trial judge also declined to apply the good faith doctrine. (12a-14a)

Regarding the remedy of suppression and the rationale of why the trial court held the search warrant to be invalid the Honorable Donald Johnston, III, held:

> Now, the first observation is the one that I made during Ms. Nieuwenhuis's comments. The affidavit clearly does not conform with Michigan statutory authority; namely, MCL 780.653(B) .... (18a)

Further, the trial court held regarding the issue of whether the warrant violated the United States and Michigan Constitutional Law that:

> It seems to me that the absence of the averment of reliability constitutes **not only a violation of statutory dimensions, but of fourth amendment constitutional dimensions, as well; because, without the identity of the person being revealed, and without any information upon which a neutral and detached magistrate can make a finding of reliability, we are working completely in the dark.**

> **It's entirely possible that the person supplying the information is some sort of a charlatan, attempting to get back at someone against whom he has a personal grievance. . . .** (21a) (emphasis added)
>
> It seems to me, therefore, **that the warrant is not adequate under the Michigan Constitution, Article One, Section twenty, or the United States Constitution, Amendment Four. And I believe the violation of the Michigan statute, of and by itself, is sufficient to invalidate the warrant.**
>
> I will, therefore, grant the defense motion to quash the warrant and suppress evidence seized pursuant to it and enter such further order on the case as may be necessary to effectuate this finding. (23a-24a)

The People filed an appeal by right pursuant to MCR 7.203(E) and Defendant-Appellee filed a brief on appeal. The Court of Appeals affirmed the trial court's decision. (27a-29a) Plaintiff-Appellant filed a Delayed Brief for Application for Leave in the Michigan Supreme Court. Defendant-Appellee filed a Brief in Opposition to Plaintiff-Appellant's Delayed Application for Leave to Appeal pursuant to MCR 7.302(D).

This Court granted leave, limited to the issue of whether a violation of MCL 780.653 should be remedied by exclusion of the evidence seized. (30a)

## SUMMARY OF ARGUMENT

The search warrant issued in defendant's case violated MCL 780.653; MSA 28.1259. This Honorable Court granted leave to determine if suppression of the evidence is the proper remedy to apply for the violation of the statute.

The defense maintains that the search warrant violated not only MCL 780.653; MSA 28.1259, but also violated the defendant's constitutional rights under the Fourth Amendment of the United States Constitution, the Michigan Constitution, Article I, Section II and applicable case law. The defense contends that the suppression of evidence is the only viable and correct remedy for the violations that occurred in this case. In the case at bar, the statutory right which was clearly violated has its roots in constitutional provisions. The search warrant in question in this case was ruled invalid based on a statutory violation, along with a ruling that the warrant was a violation of the defendants' rights pursuant to constitutional and case law. Thus, the exclusionary rule applies and suppression of the evidence in this case is the only viable and proper remedy.

## ARGUMENT

**WHERE THE SEARCH WARRANT ISSUED IN DEFENDANT'S CASE VIOLATED STATUTORY LAW, PURSUANT TO MCL 780.653; MSA 28.1259, THE UNITED STATES CONSTITUTION, AMENDMENT IV, AND THE MICHIGAN CONSTITUTION, ARTICLE I, SECTION II, EXCLUSION OF THE EVIDENCE IS THE PROPER REMEDY.**

Standard of Review: This Court reviews a trial court's ruling regarding a motion to suppress for clear error. People v Sobczak-Obetts, 463 Mich 687; 625 NW2d 764 (2001), citing People v Stevens, (After Remand), 460 Mich 626, 631; 597 NW2d 53 (1999); People v Burrell, 417 Mich 439, 448; 339 NW2d 403 (1983). Questions of law relevant to the suppression issue are reviewed de novo. Stevens, 460 Mich at 631; and People v Sierb, 456 Mich 519, 522; 581 NW2d 219 (1998).

The defense maintains that the proper remedy in the case at bar was the suppression of the evidence seized pursuant to an invalid search warrant. The search warrant in this case was held invalid because of the violation of MCL 780.653; MSA 28.1259 and because there had been a violation of the defendant's constitutional rights under the Fourth Amendment, the Michigan Constitution and applicable Michigan case law. The defense contends that the suppression of evidence in this case was not the result of only a procedural, technical, or ministerial violation of MCL 780.653. The defense maintains that the suppression of evidence is the only viable and correct remedy in this case. In the case at bar, the statutory right which was clearly violated has its roots in constitutional provisions.

The Fourth Amendment of the United States Constitution provides:

> **[N]o warrants shall issue, but upon probable cause supported by oath or affirmation**, and particularly describing the place to be searched, and the persons or things to be searched.
>
> US Const, Am IV. (emphasis added)

The Michigan Constitution, Article 1, Section 11 provides:

> **No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation**.
>
> Const 1963, Art 1, §11. (emphasis added)

Statutory law provides pursuant to MCL 780.653; MSA 28.1259 that:

> 780.653. Finding of reasonable or probable cause: affidavit, contents
>
> Sec. 3. The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> (a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.
>
> (b) **If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable**.
>
> MCLA 780.653; MSA 28.1259. (emphasis added) (34a) (All references to Appendix are referring to Appellant's Appendix.)

The search warrant in question in this case was ruled invalid based on a statutory violation, along with a ruling that the basis of this warrant was a violation of the defendant's constitutional rights under the Fourth Amendment. Thus, the exclusionary rule and

suppression of the evidence in this case was the proper remedy. The remedy here was applied to not only the statutory violation, but a constitutional violation. The statute in issue clearly mirrors the requirement of the Constitution, both the United States Constitution and the Michigan Constitution.

The search warrant to search the address of 921 Humboldt Street, S.E., Grand Rapids, Michigan provides:

> The following facts are sworn to by your affiant in support of the issuance of this warrant:
>
> 1. That affiant received information from an informant on 10/14/99 that the resident of 921 Humboldt SE was involved in the sale of narcotics. The informant stated the residence (sic) is selling the controlled substance crack cocaine. The informant described resident and seller of the controlled substance as "Chris" B/M, approx. 20, 5'8", 170 lbs, medium build/complexion, short hair.
>
> 2. Your affiant met with a reliable and credible information on 11/3/99. Your affiant was advised that the informant had observed the controlled substance cocaine available for sale from the residence within the past 36 hours.
>
> 3. Your affiant was advised by the informant the entry door to the suspects apartment has been reinforced to delay a police entry. (10a)

The defense maintains that the above-noted statements sworn by the affiant created an invalid warrant and made the search unreasonable. This was not a case where either a procedural or ministerial requirement was violated and the police were executing an otherwise facially valid warrant. Here the warrant itself violated MCL 780.653 and also lacked probable cause as a result (as was correctly ruled by the trial court). The trial court held:

The statute states that ". . .the magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit, made before him or her; the affidavit may be based upon information supplied to the complainant by a named, or unnamed, person if the affidavit contains one of the following - - and what's operative here is sub-B: If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information, and either that the unnamed person is credible or that the information is reliable." Unquote. This being from MCL 780.653; MSA 28.1259.

The problem here is that, while the statements in the affidavit indicate that the informant, in each instance, was speaking from personal knowledge, and indicated having been on the subject premises to see what the informant allegedly saw, **there is nothing in the affidavit to indicate that the unnamed person is credible, or that the information is reliable from an independent confirmation.**

Usually, in the standard form, there affidavits recite a prior track record with the informant, indicating that the informant has worked with the officer for some period of time, and has made controlled buys and supplied information and, commenting on the reliability of the information previously supplied - - the number of search warrants obtained as a result of it, the number of arrest warrants based upon it, or convictions obtained; and, typically, some further averment that the informant has never provided false information, and has proven to be reliable, by virtue of the established track record. **None of that is present in the current affidavit and, therefore, it violates - - or does not measure up to - - the Michigan statute cited.**

It's a little unclear whether the affidavit is referring to one informant or two informants. You could read it either way, but I'm not sure that it makes much difference, one way or the other. . . .

**Again, the problem here is, there's nothing in the warrant from which the magistrate can conclude that the informant is a reliable informant, or that the information can be relied upon from some other perspective.**

**It seems to me that the absence of the averment of reliability constitutes not only a violation of statutory dimensions, but of fourth amendment constitutional dimensions, as well; because, without the identity of the person being revealed, and without any information upon which a neutral and detached magistrate can make a finding of reliability, we are working completely in the dark.**

**It's entirely possible that the person supplying the information is some sort of a charlatan, attempting to get back at someone against whom he has a personal grievance.**

The other thing that should be noted is that the warrant is to search a private residence and, admittedly, all of us have a higher degree of sensitivity when viewing searches of homes.

I know, if somebody is going to come kick in my door and search my house, they darn well better have a warrant which is absolutely pristine and meets all of the legal and constitutional requirements.

And I don't know why I should tolerate a search of anybody else's house on a standard which is less stringent than the one I would apply to my own. **The constitution sets forth the right of privacy and security of private homes; and it's probably one of the touchstones of the American experience**; it's one of the things we fought the Revolution over, and if we got rid of the Redcoats, only to have our own people commit the same sort of violations, we really haven't made much progress. . . .

**It seems to me, therefore, that the warrant is not adequate under the Michigan Constitution, Article One, Section Twenty, or the United States Constitution, Amendment Four. And I believe the violation of the Michigan statute, of and by itself, is sufficient to invalidate the warrant.**

I will, therefore, grant the defense motion to quash the warrant and suppress evidence seized pursuant to it and enter such further order on the case as may be necessary to effectuate this finding. (18a-24a) (emphasis added)

The defense maintains the warrant lacked adequate probable cause and the warrant was clearly facially inadequate since there was nothing in the warrant to support the contention that the informant was reliable and credible. A search warrant may not be issued by a magistrate unless it is supported by probable cause, which is established by oath or affirmation. US Const, Am IV; Const 1963, Art 1 §11; MCL 780.651; MSA 28.1259(1).

Probable cause must exist whether a search is pursuant to a warrant or one of the exceptions to the warrant requirement. People v White, 392 Mich 404, 415; 221 NW2d 357 (1974), quoting Chambers v Maroney, 339 US 42; 90 SCt 1975; 26 LEd2d 419 (1970). Probable cause is more than a generalized suspicion or hunch. People v Burrell, 417 Mich 439, 457;339 NW2d 403 (1983). It must be an honest belief, based upon reasonable grounds that contraband, or evidence of a crime will be found at the listed location. That belief must be known at the time of the search. People v Stewart, 232 Mich 670; 206 NW2d 337 (1925) and People v Anthony, 120 Mich App 207, 211; 327 NW2d 441 (1982). Probable cause to search requires a "substantial basis" for the conclusion that there is a "fair probability" that contraband or evidence of a crime will be found in a particular place. People v Russo, 439 Mich 584, 487 NW2d 698 (1992), citing Illinois v Gates, 462 US 213; 103 SCt 2317; 76 LEd 2d 527 (1983).

In the case now before this Honorable Court probable cause does not exist from the contents of the search warrant. The state is limited to the four corners of the warrant to define probable cause. The search warrant states that a "reliable and credible" informant had seen cocaine for sale at the 921 Humboldt address within 36 hours from the execution of the search warrant. There is no information in the warrant which indicates that the informant listed in number one (1) is the same individual as number two (2). There is absolutely nothing in the warrant to show the information listed in either number one or number three was provided by a reliable or credible informant. The second statement which states that a "reliable and credible" informant saw cocaine in the above-noted address within 36 hours of the warrant is not adequate probable cause in and of itself to

search 921 Humboldt Street. As will be addressed next, there is currently nothing in the warrant to prove the informant is reliable and credible. There is nothing indicating where the cocaine is kept or whether there was any other cocaine left for sale on the premises–even within the last 36 hours of the alleged informants claiming to have seen it. There are no allegations in the warrant that either informant (if they are different and separate individuals) has ever made a controlled buy at the premises of 921 Humboldt Street, Grand Rapids, or that either informant ever saw the resident sell cocaine at the 921 Humboldt address.

The standard of review regarding probable cause was discussed in the case of People v Sloan, 450 Mich 160; 538 NW2d 380 (1995). When reviewing the Court's assessment of probable cause to search, the court looked to the Russo, supra case. In Russo the court held that the standard requires the reviewing court to ask whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause. Russo, citing Illinois v Gates, 462 US 213, 236; 103 SCt 2317; 76 LEd2d 527 (1983). A reviewing court may consider only those facts and circumstances that were presented to the magistrate. Aguilar v Texas, 378 US 108, 112, 84 SCt 1509, 1512, 12 LEd 723 (1964).

The Sloan court further held:

> . . . [R]eviewing courts must ensure that the magistrate's decision is based on **actual facts--not merely the conclusions of the affiant. . . . This purpose cannot be achieved if the magistrate simply adopts unsupported conclusions of the affiant.**

Sloan, supra at 168-169. (emphasis added)

The Sloan court further stated:

> **[T]he United States Supreme Court has explicitly recognized that probable cause determinations must be based on facts and circumstances; "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefore from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough."** [Aguilar v Texas, supra at 112, 84 SCt at 1512, quoting Nothanson v United States, 290 US 41, 47, 54 SCt 11, 13, 78 LEd 159 (1933) (emphasis added in original)]

Sloan, supra f. note 3. (emphasis added)

Specifically regarding the issue of a proper remedy in Sloan, the court excluded evidence seized in violation of a statute and recognized that, "... excluding evidence obtained in violation of a statute is not a new phenomenon under Michigan law." Sloan, supra, at 184 n.18. In Sloan, the Supreme Court held that suppression is the appropriate remedy where the statute which is violated is grounded in constitutional provisions; just like the case now before this Honorable Court. A historical analysis of a line of cases regarding this issue was addressed in the article *A Clarification Of Michigan Law Concerning The Suppression Of Evidence Seized In Violation Of A State Statute: Exposing The Court Of Appeals' Blatant Disregard For Controlling Supreme Court Precedent*, Matthew F. Leitman, 1998 Detroit College of Law Rev 225. Regarding the issue of the proper remedy the article discussed the Sherbine holding and stated:

> Turning to the question of a remedy, the court drew heavily upon its earlier decision in Sherbine, and the court held that suppression was the appropriate remedy for the statutory violation 49. The court said:
>
> In Sherbine, we held that evidence obtained specifically in violation of MCL 780.653; MSA 28.1259(3) must be excluded. The Legislature appears to have acquiesced in this particular construction of MCL 780.653; MSA

28.1259(3). While the Legislature subsequently amended MCL 780.653; MSA 28.1259(3) because it disagreed with portions of our statutory analysis provided in Sherbine, it is significant that the Legislature when instituting such amendments did not alter our holding that evidence obtained in violation of the statute must be excluded. To change the law in that regard would have been an easy and convenient task for the Legislature. Neither the language in the amendments, nor the legislative history pertinent to the amendments provide a basis for concluding that a sanction other than exclusion is appropriate for the violation of MCL 780.653; MSA 28.1259(3). Clearly, the Legislature shares our view that no remedy other than exclusion is as likely to assure the full enforcement of all the requirements under MCL 780.653; MSA 28.1259(3) - a statute specifically designed by the Legislature to implement the constitutional mandate for probable cause under Const 1963, art 1, § 11.

Leitman, *A Clarification Of Michigan Law Concerning The Suppression Of Evidence Seized In Violation Of A State Statute: Exposing The Court Of Appeals' Blatant Disregard For Controlling Supreme Court Precedent*, Detroit L Rev 225, 233 (1998).

The warrant in this case simply does not met the standards set by MCL 780.653; MSA 28.1259(3) or case law. The defense maintains that MCL 780.653 was designed to specifically implement the Constitutional mandate for probable cause pursuant to the Const 1963, Article 1, §11 and U.S. Constitution, Amendment IV.

The Court of Appeals held regarding this specific issue that:

On Appeal, the prosecution contends that the trial court's order must be reversed because a violation of MCL 790.653 does not warrant the suppression of the evidence. We disagree. We review issues of statutory construction de novo. See Mager v Dep't of State Police, 460 Mich 134, 143 n 14; 595 NW2d 142 (1999).

We find the case of People v Sloan, 450 Mich 160, 183-184; 538 NW2d 380 (1995), dispositive. **The Sloan Court ruled that mere conclusions by a police officer affiant, in the absence of facts supporting the conclusions, could not support the issuance of a search warrant under MCL 780.653. See Sloan, supra at 166-172. The Court then considered the appropriate remedy for the violation of the statute that had occurred:**

> In [People v] Sherbine, [421 Mich 502; 364 NW2d 658 (1984)], superceded on other grounds by statute as stated in People v Lucas, 188 Mich App 554 (1991)], we held that evidence obtained specifically in violation of MCL 780.653 . . . must be excluded. The Legislature appears to have acquiesced in this particular construction of MCL 780.653 . . . While the Legislature subsequently amended MCL 780.653 . . . because it disagreed with portions of our statutory analysis provided in Sherbine, it is significant that the Legislature when instituting such amendments did not alter our holding that evidence obtained in violation of the statute must be excluded. To change the law in that regard would have been an easy and convenient task for the Legislature. **Neither the language in the amendments, nor the legislative history pertinent to the amendments provide a basis for concluding that a sanction other than exclusion is appropriate for the violation of MCL 780.653 . . . . Clearly, the Legislature shares our view that no remedy other than exclusion is as likely to assure the full enforcement of all the requirements under MCL 780.653 . . . – a statute specifically designed by the Legislature to implement the constitutional mandate for probable cause under Const 1963, art 1, § 11.**
>
> Because the blood test result procured pursuant to the instant search warrant constitutes evidence obtained in violation of MCL 780.653 . . . , we conclude that it must be excluded. [Sloan, supra at 183-184 (footnotes omitted).]
>
> **Sloan, therefore, makes clear that evidence obtained under search warrants issued in violation of MCL 780.653 must be suppressed. It is clear that the search warrant in the instant case was indeed issued in violation of MCL 780.653. Indeed, the prosecution does not argue to the contrary. Accordingly, the trial court did not err in quashing the search warrant, suppressing the discovered evidence, and dismissing the charges against defendant.** (28a-29a)

The defense contends that both the trial court and the Court of Appeals properly held suppression to be the proper remedy under the specific circumstances of this case. A violation of constitutional requirements for issuance of a search warrant is suppression of evidence seized pursuant to an invalid warrant. People v Cartwright, 454 Mich 550, 558; 563 NW2d 208 (1997). Recent case law has addressed whether suppression of

evidence seized is the proper remedy when reviewing a violation of a particular statute. People v Stevens, 460 Mich 626; 597 NW2d 53 (1999); People v Sobczak-Obetts, 463 Mich 687; 625 NW2d 764 (2001); and People v Hamilton, 465 Mich 526; 638 NW2d 92 (2002). The defense maintains that the case at bar is not only distinguishable from the above-noted cases, but is a case which provides facts which were not present in the other cases and which mandates that the proper remedy in the case at bar is suppression of the evidence.

In order to review the above-noted cases in context People v Knopka, 220 Mich 540; 190 NW2d 731 (1922) must be addressed. In Knopka, the Court held that the warrant in that case had been issued without a showing of probable cause, and thus was constitutionally defective. Therefore, because the warrant was constitutionally defective because of a lack of probable cause the proper remedy for such violations is suppression of all evidence seized as a result. This theme continues in the above-noted recent cases. The defense contends that unlike Stevens and its progeny, the case at bar clearly violates MCL 780.653 and, as a direct result, is also a constitutional violation. The defense maintains this case is not a purely technical statutory violation.

In Stevens the issue before the Court was to determine whether the Fourth Amendment requires the exclusion of evidence obtained pursuant to a valid search warrant (during a search of proper scope), because of a violation of "knock and announce" principles. The Court held that the inevitable discovery exception to the exclusionary rule applied and thus suppression of the evidence was not the proper remedy under these facts

and circumstances. The Court discussed the issue of a proper remedy when there was potential involvement of the Fourth Amendment that:

> We first consider whether police officers' violation of the defendant's Fourth Amendment rights requires exclusion of the evidence. The introduction into evidence of materials seized and observations made during an unlawful search is prohibited by the exclusionary rule. Weeks v United States, 232 U.S. 383; 34 S. Ct. 341; 58 L. Ed. 652 (1914), overruled on other grounds in Elkins v United States, 364 U.S. 206; 80 S. Ct. 1437; 4 L. Ed. 2d 1669 (1960); Silverman v United States, 365 U.S. 505; 81 S. Ct. 679; 5 L. Ed. 2d 734 (1961). Additionally, the exclusionary rule prohibits the introduction into evidence of materials and testimony that are the products or indirect results of an illegal search, the so-called "fruit of the poisonous tree" doctrine. Wong Sun v United States, 371 U.S. 471; 83 S. Ct. 407; 9 L. Ed. 2d 441 (1963).
>
> The exclusionary rule, which provides for the suppression of illegally obtained evidence, originates in three decisions of the United States Supreme Court around the turn of the century. Weeks v United States, 232 U.S. 383; 34 S. Ct 341; 58 L. Ed. 652 (1914), Adams v New York, 192 U.S. 585; 24 S. Ct. 372; 48 L, Ed. 575 (1904), and Boyd v United States, 116 U.S. 616; 6 S. Ct. 524; 29 L. Ed. 746 (1886). US Const, Am IV, provides:
>
> **The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.**
>
> **Therefore, the Fourth Amendment protects citizens from unreasonable searches and seizures.** Terry v Ohio, 392 U.S. 1, 9; 88 S. Ct. 1868; 20 L. Ed. 2d 889 (1968); People v Faucett, 442 Mich. 153, 157-158; 499 N.W.2d 764 (1993).
>
> **The federal constitutional protections against unreasonable searches and seizures have been extended to state proceedings through the Due Process Clause of the Fourteenth Amendment.** See Mapp v Ohio, 367 U.S. 643, 655; 81 S.Ct. 1684; 6 L. Ed. 2d 1081 (1961); People v Nash, 418 Mich. 196, 211; 341 N.W.2d 439 (1983) (opinion of Brickley, J.); People v Burrell, supra at 448, n 15. **Under the circumstances of this case, art 1, § 11 of the Michigan Constitution is to be construed as providing the same protection as that of its federal counterpart.** See People v Toohey,

438 Mich. 265, 270-271; 475 N.W.2d 16 (1991), and People v Collins, 438 Mich. 8, 25; 475 N.W.2d 684 (1991). n4 **Therefore, defendant's motion to suppress implicates his federal constitutional rights.** Faucett, supra at 158.

Stevens, supra at 634-635. (emphasis added)

However, in Stevens, (unlike the case at bar) the Court applied an exception to the exclusionary rule. The court held that under the circumstances of Stevens that the evidence would inevitably have been discovered. The Court specifically held:

> **[T]he "knock and announce" statute does not control the execution of a valid search; rather, it only delays entry**. One stated purpose of this delay by police officers is to allow the occupants "a brief opportunity . . . to order [their] personal affairs before the [officers] enter." United States v Kane, 637 F.2d 974, 977 (CA 3, 1981). n8 **In the present case, the officers were operating under a valid search warrant.** The police purchased narcotics from defendant's female companion and followed the woman back to defendant's home. **After determining that the defendant was on probation for a controlled substance conviction, the police sought and obtained a search warrant. Neither party contests the validity of the search warrant.**

Stevens, supra, at 645-646 (emphasis added)

In the case now before this Court that is not the case. Here, the trial court and the Court of Appeals have held the warrant itself to be clearly invalid. As noted by the Court of Appeals in their Opinion:

> It is clear that the search warrant in the instant case was indeed issued in violation of MCL 780.653. Indeed, the prosecution does not argue to the contrary. (29a)

The Stevens case is easily distinguishable from the facts of this case. Here, no exception to the exclusionary rule exists and the warrant itself is invalid. There would be no inevitable discovery in this case because the warrant was invalid and there was no other

evidence or way to implicate the defendant. As the Stevens Court held a violation of the knock and announce statute, ". . . does not control the execution of a valid search warrant; rather, it only delays entry." Stevens, supra at 645. Stevens held further that:

> **"The officers were armed with a valid search warrant. Defendant does not argue that the officers' search exceeded the scope of that warrant. It was not the means of entry that lead to the discovery of the evidence, but, rather, it was the authority of the search warrant that enabled the police to search and seize the contested evidence. Therefore, the searching and seizing of the evidence was independent of failure to comply with the "knock and announce" statute."**

Stevens, supra, at 646 (emphasis added)

The case of Sobczak-Obetts, supra, is also fundamentally distinguishable from the case at bar. In Sobczak-Obetts a federal search warrant was executed by both state and federal prosecutors. The defendant was subsequently charged in state court and the defense filed a motion to suppress based on a violation of MCL 780.654; MSA 28.1259(4). The defense argued that the motion to suppress must be granted when the defendant was not provided with a copy of the Affidavit in support of the search warrant at the time of the search. The Affidavit in question had been sealed by federal court.

The Sobczak-Obetts court held that the exclusionary rule did not apply under that factual scenario because the violation was a procedural violation of Michigan's statutory warrant requirements. In Sobczak-Obetts, the Court of Appeals, 238 Mich App 495; 606 NW2d 658 (1999) originally dismissed the case, however, with a divided panel. In the Supreme Court Opinion, Judge Hoekstra's disagreement with the remedy of suppressing the evidence (in the Court of Appeals Opinion) was quoted, when he disagreed with the holding in People v Moten, 233 Mich 169; 206 N.W. 506 (1925) and stated:

While this particular statutory provision generally relates to a constitutional right, **the specific portion of the statute requiring a recitation of the basis for probable cause or the attachment of the affidavit only barely relates to the substantive right the Legislature is seeking to protect. The requirement is more of a ministerial duty than a right.** Consequently, were I able, I would hold that defendant must show some prejudice before the trial court suppresses the evidence seized using a statutorily defective warrant. **In this case, for example, defendant was eventually afforded a chance to contest the basis for the warrant. I am unable to see how defendant was put at a disadvantage by being forced to delay her arguments until the parties obtained a copy of the federal affidavit**. I think it is especially important that defendant be forced to show some level of prejudice given that the warrant met all the requirements of the federal warrant statute. Here, I find it necessary to exclude the evidence in question because the state warrant requirements differ from federal warrant requirements. **Neither party has argued that the federal warrant requirements are unconstitutional, so it seems that I am forced to declare a search invalid because the ministerial duties associated with executing a federal warrant differ from those associated with executing a state warrant, a result I hope our Supreme court will find equally unsettling**. [238 Mich. App. at 503-504.] Judge Cavanagh concurred only in the result. 238 Mich. App. at 504.

Sobczak-Obetts, supra, at 693. (emphasis added)

Judge Gage dissented in her opinion in the Court of Appeals and her dissent was quoted by the Supreme Court which stated:

Judge Gage dissented, opining that the court of Appeals decisions in People v Garvin, 235 Mich. App. 90; 597 N.W.2d 194 (1999), and People v Pipok (After Remand), 191 Mich. App. 669; 479 N.W.2d 359 (1991), controlled this case, and that this case was distinguishable from *Moten*. While the statute in effect at the time *Moten* was decided required that the search warrant itself contain a recitation of the affidavit's statement of probable cause, Judge Gage noted, the current statute allows instead the attachment of the affidavit to the search warrant. **In light of this statutory amendment, Judge Gage stated she would hold that *Moten* was not controlling, and that suppression of the firearms in this case was not required because defendant had failed to demonstrate that she was prejudiced as a result of the "technical, nonconstitutional" statutory violation.** 238 Mich. App. at 504-508.

Sobczak-Obetts, supra at 693-94. (emphasis added)

The Sobczak-Obetts' Court noted that the defense had not argued that the defendant's Constitutional rights had been violated. In footnote nine (9) the Court noted:

> There is no federal counterpart to the Michigan statutory requirement that the search warrant state on its face the grounds or cause for its issuance or have the affidavit attached. MCL 780.654; MSA 28.1259(4). See 18 USC 3101 *et seq.*; FR Crim P 41(c). **Defendant did not, and does not now, claim any deprivation of *constitutional* rights with respect to the procedure utilized by the federal magistrate in issuing the search warrant or in sealing the affidavit, or by the federal and state officers in executing the warrant.**

The Court is clear in Sobczak-Obetts, that the search had been done in conjunction with a valid federal warrant. The Court further held:

> **The requirements of §5 are ministerial in nature, and do not in any way lead to the acquisition of evidence; rather, these requirements come into play only after evidence has been seized pursuant to a valid search warrant. Because the exclusionary rule pertains to evidence that has been illegally *seized*, it would not be reasonable to conclude that the Legislature intended to apply the rule to a violation of the postseizure, administrative requirements of §5. Just as there was no causal relationship between the violation of the "knock and announce" statute and the seizing of the evidence at issue in *Stevens*, there is in the instant case no causal relationship between the officers' failure to provide defendant with a copy of the search warrant affidavit and the seizure of the firearms.**
>
> We note further that the deterrent purpose n19 of the exclusionary rule would not be served by ordering suppression of the evidence in this case. **The officers were executing a valid federal warrant that complied with all federal requirements. The federal magistrate had ordered that the affidavit be sealed. Defendant does not argue that this procedure violated her constitutional rights or that it ran afoul of any federal requirements concerning the validity of search warrants. Defendant's sole contention is that the failure to leave a copy of the affidavit at her residence or to otherwise "forthwith" provide her with the affidavit violated MCL 780.655; MSA 28.1259(5).** The officers cannot be faulted for their inability to provide a copy of the affidavit, since the affidavit was under

seal by direction of a federal magistrate. Because there was no police "misconduct" in this case, the deterrent purpose of the exclusionary rule would not be served by applying it under these circumstances. Moreover, because the police would have recovered the weapons irrespective of the alleged statutory violation, suppression of the evidence in this case would "undermine the adversary system by putting the prosecution in a worse position" than if the violation of §5 had not occurred. *Stevens*, 460 Mich. at 637, citing, *Nix* 467 U.S. at 447.

Sobczak-Obetts, supra at 709-10. (emphasis added)

Finally, the Court concluded:

**The police officers in this case were acting under a valid search warrant and within the scope of that warrant. Defendant's constitutional rights were in no way infringed. There is no causal connection between the seizure of the firearms and the officers' failure, *after* the execution of the warrant, to provide defendant with a copy of the search warrant affidavit.**

**We are unable to discern any legislative intent that a violation of the technical requirements of MCL 780.655; MSA 28.1259(5) result in the suppression of evidence obtained pursuant to a valid search warrant.**

Sobczak-Obetts, supra, at 712. (emphasis added)

The case now before this Honorable Court is fundamentally different than Sobczak-Obetts. In this case the defendant's constitutional rights were clearly violated pursuant to his right against illegal search and seizure. MCL 780.653 specifically implements the constitutionally based mandate for probable cause as mandated by Const 1963, Act 1, §11 and U.S. Constitution, Am IV. Here, no one, including the People, have argued that the warrant itself complied with the mandates of MCL 780.653. Simply put, the mandates of MCL 780.653 are constitutionally based. This is a clearly different scenario than a statutory violation which is procedural or technical in nature. Here, unlike in Sobczak-Obetts, defendant has continually claimed a "deprivation of constitutional rights."

In People v Hamilton, 465 Mich. 526; 638 N.W.2d 92 (2002), the Court held that where an arresting officer had probable cause to believe a crime had been committed, he therefore had the constitutionally required basis for the search and subsequent seizure which occurred in the case. Based on that analysis, the court held the proper remedy was not suppression. In effect, the Court held that the arrest did not violate the Fourth Amendment and the exclusionary rule did not apply. Hamilton, supra at 533. Again, the defendant in Hamilton is distinguishable from the defendant in the case at bar. Here, the defendant's Fourth Amendment rights were violated, along with statutory laws. Thus, here the search warrant did not meet the constitutionally required basis for the warrant.

The Appellant's Brief on appeal requests this Honorable Court to reconsider its grant of leave in this case and permit the parties to brief and argue the question of whether the "good faith" exception to the exclusionary rule should apply to violations of Article I, section II of the Michigan Constitution. Plaintiff-Appellant maintains that the Court of Appeals did not address the question of whether the Court should adopt the good faith exception to the exclusionary rule. (Plaintiff-Appellant's statement of questions presented p. vi) Defendant-Appellee respectfully disagrees. The Court of Appeals held regarding the good faith issue that:

> We note that the prosecution spends a considerable portion of its brief discussing the so-called "good faith exception" to the requirement of a valid search warrant and arguing that suppression was not warranted in this case because in executing the warrant issued by the magistrate here, the police acted in good faith. The prosecution points to the case of *People v Hill,* 192 Mich App 54, 56; 480 NW2d 594 (1994), in which this Court declined the invitation to "recognize and apply a good-faith exception to the search warrant requirement because the police acted on a search warrant they believed was valid." The prosecution contends that we should either

> distinguish *Hill* or follow it reluctantly under MCR 7.215(I)(1) and call for a conflict panel. **We decline to take either of these actions. Indeed, as noted earlier, this case is squarely governed by the Supreme Court construction of the applicable statute in *Sloan, supra.*** We are not at liberty to overrule or modify Supreme Court precedent, *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), and the resolution of this case on statutory grounds renders unnecessary a consideration of the prosecution's constitution-based search and seizure issues. See *Sherbine, supra* at 506. (29a) (emphasis added)

Appellant argues that the Courts should adopt the "good faith" arguments found in United States v Leon, 468 US 877; 104 S Ct 3405; 82 LEd 677 (1984). The defense maintains that the Courts should not adopt the use of the good faith exception, just as it has declined to do so since 1984. The prosecution continues to argue that the error here is the magistrate's, not the officers and thus the officer is being penalized for the magistrate's error. However, the trial court addressed this issue after reviewing the search warrant itself and applying the lack of information found in the warrant to the facts in this case. As the Honorable Donald Johnston III held:

> **It seems to me that the absence of the averment of reliability constitutes not only a violation of statutory dimensions, but of fourth amendment constitutional dimensions, as well; because, without the identity of the person being revealed, and without any information upon which a neutral and detached magistrate can make a finding of reliability, we are working completely in the dark.**
>
> **It's entirely possible that the person supplying the information is some sort of charlatan, attempting to get back at someone against whom he has a personal grievance.** (21a) (emphasis added)

The trial judge further states regarding the application of "good faith" that:

> I think it's entirely possible that the officer who filled out the warrant was operating in good faith; that is to say, I don't think there's any reason to believe he, knowingly or intentionally, was trying to perpetrate a fraud on the

Court. I happen to know Officer Butler, at least professionally, from his many appearances in this court, and he strikes me as being, in all respects, above-board, honorable and professional; and I don't think there's any reason to believe he's trying to pull a fast one on anybody. **I think the problem is, he just put together an affidavit that doesn't make the grade**.

**The question that's suggested by Ms. Brinkman's comment is that we should examine whether his good faith is sufficient to take a warrant that otherwise is insufficient, and make it adequate**. And I guess my reaction to that is that, really, good faith or bad faith, it doesn't make a whole lot of difference; although, frankly, much happier about officers that make good-faith mistakes than officers that make bad-faith mistakes.

If there was an officer falsifying an affidavit, it seems to me he's probably committed a crime in the nature of perjury, and should be prosecuted. There's nothing suggested that Officer Butler did anything of the sort, and I don't believe it for a minute.

**But I don't believe the fact that he acted in good faith can satisfy an otherwise missing element in the warrant. I don't think the warrant is adequate to establish probable cause, without something in it to verify the believability - - or credibility - - of the unnamed informant in paragraph two. And I don't think there's enough in paragraph one that's fresh that would allow us to make any conclusions about it at all.**

**It seems to me, therefore, that the warrant is not adequate under the Michigan Constitution, Article One, Section Twenty, or the United States Constitution, Amendment Four. And I believe the violation of the Michigan statute, of and by itself, is sufficient to invalidate the warrant.** (22a-24a)(emphasis added)

The trial court correctly held that this particular search warrant and the illegally seized evidence must be quashed based on the Michigan Constitution, Article One, Section Twenty, the United States Constitution, Amendment Four, and the violation of the Michigan Statute itself. The search warrant clearly lacked adequate probable cause, and the warrant must stand on its four corners.

In People v Timothy Allen David, 119 Mich App 289, 326 NW2d 485 lv app den 417 Mich 858 (1983), the Court discussed the applicability of good faith to a search warrant which lacked probable cause for the same reason as the warrant in this case. In David, the trial court quashed the warrant and dismissed the case because there was nothing in the warrant to independently judge the accuracy and reliability of the informant's information. The prosecution appealed and argued, as the prosecution here argues that the court should adapt a good faith exception to the exclusionary rule regarding illegally seized evidence. Although the case was decided prior to the Leon case, the argument and analysis remains the same. The David Court held that Michigan does not recognize a good faith exception to the exclusionary rule especially when there is nothing in the warrant to independently judge the accuracy and reliability of the informant. The David court held regarding the defective warrant that:

> The federal exclusionary rule, a judicially created means of effectuating fourth Amendment rights, was made applicable to the states via the Fourteenth Amendment in Mapp v Ohio, 367 US 643; 81 SCt 1684; 6 LEd 1081 (1961). This was already the law of the state since the exclusionary rule was first applied to unconstitutional searches and seizures in People v Margolis, 217 Mich 423; 186 NW2d 488 (1922). **The purpose of the exclusionary rule is to deter violations of the Fourth Amendment and promote judicial integrity so that a court is not a party to the use of illegally seized evidence. Thus, under both the United States and Michigan Constitutions, illegally seized evidence generally must be suppressed.** Mapp v Ohio, supra; People v Plantefaber, 410 Mich 594; 302 NW2d 557 (1981).
>
> In Stone v Powell, 428 US 465; 96 SCt 3037; 49 LEd 2d 1067 (1976), the Court stated that the concept of judicial integrity has limited force as a justification for the exclusionary rule, and, thus, fourth Amendment violations could not be raised in federal habeas corpus proceedings. **With the rule's primary justification being deterrence, illegally seized , the affidavit made no allegation that the informant was credible or that his**

> **information had proven reliable in the past. Without such a showing, therefore, the informant's information can only be used if independently corroborated.**
>
> David, supra, p. 294. (emphasis added)

Regarding the specific argument by the prosecution in the case now before this Honorable Court that the good faith exception should be applied, the exact same rational was argued by the People in David. The court held:

> **The people also argue the exclusionary rule should not be applied when there is a good-faith violation of the Fourth Amendment. The people maintain that, since the purpose of the exclusionary rule is to deter police misconduct, the rule should not be applied when the deterrent effect would not be furthered, as in a case of good-faith mistaken behavior on the part of the police.**
>
> David, supra, at 296. (emphasis added)

The David Court applies the above-noted argument and concludes:

> Evidence is admissible when its exclusion would not deter illegal police activity. See, Michigan v DeFillippo, 443 US 31; 99 SCt 2627; 61 LEd 2d 343 (1979); Brown v Illinois, 422 US 590; 95 SCt 2254; 45 LEd 2d 416 (1975). **The People would have us go one step further and find that where the police act unconstitutionally, but in good faith, the exclusionary rule need not be applied.**
>
> David, supra, at 296-297. (emphasis added)

In regards to applying the good faith exception under these circumstances, the David Court held:

> **Such a holding would, in effect, remove the probable cause requirement from the Fourth Amendment. A "good faith" exception to the exclusionary rule would insulate the magistrate's decision to grant a search warrant from appellate review. In every case where a constitutionally infirm search warrant was issued, the prosecution could reasonably claim that the police acted in good faith. In effect, the**

**Constitutional language that all warrants be issued only on a showing of probable cause would become a nullity**.

David, supra at 297-198. (emphasis added)

The David Court further held regarding the application of a good faith exception to the exclusionary rule under circumstances as found in this case that:

**Furthermore, adoption of a "good faith" standard would remove the incentive for police officers to find out what sort of police conduct constitutes an unreasonable invasion of privacy. On a police force, efficiency in obtaining convictions is rewarded so recognition of a good-faith exception to the warrant requirement would encourage police officers to remain ignorant of the law in order to garner more evidence and obtain more convictions. The end result, increased illegal police activity, is the very problem that the exclusionary rule is designed to avert.**

David, supra, at 298. (emphasis added)

The prosecution in their brief is requesting the Court to apply the "good faith" exception to the search warrant issue pursuant to Leon, supra. The Leon Court held that evidence seized with a warrant which appears valid on its face may under certain conditions be admitted pursuant to Leon. However, there is no "good faith" exception in Michigan permitting admission of evidence seized during an illegal search. People v Landt, 188 Mich Ap 234; 469 NW2d 37 rev other grnds, 439 Mich 870 (1970) (1991), see also, People v Hill, 192 Mich App 54; 480 NW2d 594 (1991), leave denied, 439 Mich 968 (1992).

In People v Sherbine, 421 Mich 502,364 NW2d 658 (1984), the Michigan Supreme Court had an opportunity to adopt a "good faith" exception to the State's exclusionary rule but did not . Since the Michigan Supreme Court did not adopt the "good faith" exception

to the state's exclusionary rule, the defense maintains that it was the Supreme Court's intent that the exception should not apply pursuant to Michigan Law. People v Sellars, 153 Mich App 22, 394 NW2d 133 (1986). The Michigan exclusionary rule has been held to be a necessary ingredient to the presentation of the right under the Michigan Constitution to be free of unreasonable governmental intrusions. People v Sundling, 153 Mich App 277; 395 NW2d 308 (1986) lv app den, 428 Mich 887 (1987). Michigan does not recognize a "good faith" exception to the exclusionary rule. People v Bloyd, 416 Mich 538, 556; 331 NW2d 447 (1982); People v Wagner, 114 Mich App 541, 574-575; 320 NW2d 251 (1982) [Bronson J. concurring]; David, supra, People v Haddad, 122 Mich App 229, 232; 332 NW2d 419 (1981); People v Tanis, 153 Mich App 806, 813, 396 NW2d 544 (1986); People v Hall, 158 Mich App 194; 404 NW2d 219 (1987); Sellars, supra, and Sherbine, supra.

In People v Hellis, 211 Mich App 634; 536 NW2d 587 (1995), the defendant entered a conditional guilty plea to his drug cases. Justice O'Connell held that although the warrant in the case lacked probable cause, the evidence would not be suppressed based on the "good faith" exception. Justice Jansen concurred in the Opinion, but only to the result not regarding the issue of good faith. Justice Jansen made it very clear that the concurring opinion disagreed with Justice O'Connell attempting to adopt the good faith exception.

Justice Jansen held, ". . . [I]t is well established that there is no good-faith exception to the exclusionary rule in Michigan, and I would adhere to that precedent." Hellis, supra at 651. The Hellis Court provides an excellent history of the Michigan's Court's rulings

regarding the reasons why the good faith exception to the exclusionary rule has not been adopted. The Court stated regarding this history that:

> **In People v Bloyd, 416 Mich 538, 556; 331 N.W.2d 447 (1982), three of the six justices participating in that case declined to adopt the good-faith exception to the exclusionary rule. Three of the remaining justices concurred in the result, but for a different reason. Although Bloyd does not establish a rule of law by stare decisis because a majority of justices sitting in the case did not agree that the good-faith exception does not apply, People v Anderson, 389 Mich 155, 170; 205 N.W.2d 461 (1973), Bloyd presents a starting point for this Court.**
>
> **In People v David, 119 Mich. App. 289, 297-299; 326 N.W. 2d 485 (1982), this Court refused to recognize a good-faith exception to the exclusionary rule. Next, in People v Sellars, 153 Mich. App. 22, 28; 394 N.W.2d 133 (1986), this Court refused to adopt the good-faith exception to the exclusionary rule, noting that our Supreme Court did not do so in People v Sherbine, 421 Mich 502; 364 N.W.2d 658 (1984), which was decided after the United States Supreme Court had adopted a good-faith exception to the exclusionary rule in United States v Leon, 468 U.S. 897; 104 S. Ct. 3405; 82 L. Ed. 2d 677 (1984).**
>
> **Likewise, in People v Sundling, 153 Mich. App. 277, 289; 395 N.W.2d 308 (1986), this Court held that it was error for the trial court to apply a good-faith exception to the exclusionary rule. This Court set forth compelling reasons not to adopt a good-faith exception and specifically questioned the utility of the good-faith exception "in light of the dearth of evidence indicating that application of the exclusionary rule substantially hinders effective and efficient law enforcement." Id., p 292. Next, in People v Tanis, 153 Mich. App. 806, 813; 396 N.W.2d 544 (1986), this Court held that it would "not adopt a rule that, where the police act in good faith and reasonable reliance on a search warrant which is issued in violation of a statute, the exclusionary rule will not be applied."**
>
> **In People v Jackson, 180 Mich. App. 339, 346; 446 N.W. 2d 891 (1989), this Court held that Michigan courts have declined to adopt a good-faith exception to the exclusionary rule, finding greater protection afforded a defendant under the state constitution. In People v Hill, 192 Mich. App 54, 56; 480 N.W.2d 594 (1991), this Court again declined to recognize and adopt a good-faith exception to the search warrant**

requirement where the police acted pursuant to a search warrant they believed was valid. Finally, in People v Paladino, 204 Mich. App. 505, 507; 516 N.W.2d 113 (1994), this Court rejected the application of the good-faith rule where the police acted on a warrant that was later ruled to be invalid. Although the panel in Paladino stated that it was following Hill only because it was required to do so under Administrative Order No. 1990-6, there is no appellate court opinion in this state that has adopted a good-faith exception to the exclusionary rule.

Judge O'Connell's attempt to distinguish Hill from the present case is a distinction without a difference and appears to be an attempt merely to diverge from the well-established precedent in this state that there is no good-faith exception to the exclusionary rule. In David, Sundling, Tanis, Jackson, and Paladino, the police relied on search warrants that were later found to be invalid. Yet, in all those cases, the Court of Appeals still held that it would not adopt a good-faith exception to the exclusionary rule despite the fact that there was no primary police illegality. Further, in Hill, the police first acted illegally because they did not have probable cause to arrest the defendant without a warrant. After arresting defendant and searching him, the police were able to obtain a search warrant for the defendant's house. Because the initial arrest and search were illegal, the search warrant was invalid because probable cause to issue the warrant was based on the illegal arrest and search. However, this Court held that it would not recognize and apply a good-faith exception to the search warrant requirement where the police acted on a search warrant they believed was valid. Hill, supra, p 56.

Thus, the attempt to distinguish primary police illegality from secondary police illegality (acting upon what the police believe is a valid warrant) is simply a distinction without a difference in Michigan jurisprudence. This is so because this Court in cases decided in this state after the United States Supreme Court adopted a good-faith exception to the exclusionary rule continued not to adopt any good-faith exception to the exclusionary rule where the police acted on a warrant later found to be invalid. Tanis, 153 Mich. App. 806; Sundling, 153 Mich. App. 277 at 289-292; Jackson, 180 Mich. App. 339 at 345-346; Paladino, supra, p 507.

Further, recent Michigan Supreme Court decisions do not undercut the supporting rationale of those decisions decided before Hill. In Sitz v

**Dep't of State Police, 443 Mich 744, 752; 506 N.W.2d 209 (1993), our Supreme Court made clear that Const 1963, art 1, § 11 is to be construed as providing the same protection as that secured by the Fourth Amendment unless there is a compelling reason to impose a different interpretation. Such compelling reasons were succinctly set forth in David, supra, pp 297-298, and they are repeated here:**

> Such a holding [that the exclusionary rule need not be applied where the police act unconstitutionally but in good faith] would, in effect, remove the probable case requirement from the Fourth Amendment. **A "good-faith" exception to the exclusionary rule would insulate the magistrate's decision to grant a search warrant from appellate review. In every case where a constitutionally infirm search warrant was issued, the prosecution could reasonably claim that the police acted in good faith. In effect, the constitutional language that all warrants be issued only on a showing of probable cause would become a nullity.**
>
> Furthermore, adoption of a "good-faith" standard would remove the incentive for police officers to find out what sort of police conduct constitutes an unreasonable invasion of privacy. On a police force, efficiency in obtaining convictions is rewarded so recognition of a good-faith exception to the warrant requirement would encourage police officers to remain ignorant of the law in order to garner more evidence and obtain more convictions. **The end result, increased illegal police activity, is the very problem that the exclusionary rule is designed to avert.**

**Further, the exclusionary rule has a longer history in this state than the federal exclusionary rule. "Our commitment to the protection of liberty was further demonstrated when the Supreme Court of Michigan adopted an exclusionary rule in 1919, forty-two years before it was mandated by federal law. People v Marxhausen, 204 Mich. 559; 171 N.W. 557 (1919)." Sitz, supra, pp 775-776. Moreover, beginning in 1982, this Court has consistently declined to adopt a good-faith exception to the exclusionary rule.**

**Accordingly, there is a compelling reason to impose a different interpretation under the Michigan Constitution and not adopt a good-faith exception to the exclusionary rule in this state. Therefore, I would**

> **find that the trial court clearly erred in applying a good-faith exception to the exclusionary rule, because I am left with a definite and firm conviction that a mistake has been made. People v Faucett, 442 Mich. 153, 170; 499 N.W.2d 764 (1993); People v Lyons (On Remand), 203 Mich. App. 465, 468; 513 N.W.2d 170 (1994). There is no authority to adopt a good-faith exception to the exclusionary rule under Michigan jurisprudence, and the trial court erred in doing so.**
> Hellis, supra, 650-656.

The defense maintains that this warrant was so obviously lacking any information regarding the informant that the warrant was so facially deficient that the executing officers (or the detective in charge as here) could not reasonably have presumed this warrant to be valid. Thus, the defense maintains it is arguable as to whether this officer's reliance on this warrant could be said to have been the result of good faith reliance on a search warrant issued by a neutral and detached magistrate anyway.

Based on the above-noted analysis, the defense maintains that the trial court's ruling that the search warrant be quashed and the remedy of suppression was proper. Based on the analysis that the warrant lacked adequate probable cause, violated the United States Constitution, the Michigan Constitution, Michigan case law and statutory law the trial court's and Court of Appeals' decisions must be upheld. Further, based on the analysis of the court and the fact that Michigan does not have a "good faith" exception to the exclusionary rule and has not adopted the exception nor should they, the trial court's ruling, and opinion of the Court of Appeals must be affirmed.

Appellant also argues that there is a viable alternative remedy regarding the violations found in the warrant in this case. Appellant argues that the remedy to apply should be MCL 780.657; MSA 28.1259(7) wherein if a person who executes a search

warrant and "wilfully" exceeds his authority or exercises it with "unnecessary severity" and/or MCL 780.658; MSA 28.1259(8) which provides that any person who "maliciously" and without probable cause procure a search warrant to be issued and executed could in either case be fined up to $1,000.00 and imprisoned not more than one year. Appellant argues, " ... [t]hese statutes would directly address misconduct by police officers in obtaining search warrants ... " Appellant's Brief on Appeal to the Supreme Court p. 22. Appellant acknowledges that it could be argued " ... that ... [these] ... statutory sanctions .... may be ineffective because the criminal penalties are rare." Appellant's Brief on Appeal to Supreme Court p. 22.

The defense maintains that the above-noted remedy is in fact no remedy at all. The warrant in this case lacked probable cause to enter and search a residence. A significant part of the warrant was lacking. The entire basis of alleged probable cause was based on some alleged statements given by an allegedly reliable and credible informant. Under this scenario, why should we bother with a written warrant, or if written, why even bother to have it reviewed? Whether the warrant is constitutionally invalid or otherwise – there would be no real remedy. If an officer or magistrate knew that if they allowed a faulty, facially deficient warrant to be used to make an illegal seizure, and yet absolutely nothing would happen to them – how, under any circumstances could that possibly be a deterrent? The real meaning of deterrence is if an individual does a specific act and that individual knows there will be a real and substantial punishment for the act, that is deterrence. How else will the proper statutory and constitutional laws be upheld? In effect, the police would be allowed to police themselves – which is no remedy. The remedy must be suppression

of the evidence since the evidence seized was seized in violation of the Constitution – and seized in violation of statutory law – law which grew from its roots out of the Constitution.

This issue was addressed in Justice Cavanagh's dissent in Sobczak-Obetts when he addressed the remedy to be applied to a violation of MCL 780.655; MSA 28.1259(5) and wrote:

> Second, I fear that the majority's search for legislative intent effectively upends the intent that is most clear. Though MCL 780.655; MSA 28.1259(5) does not provide on its face for any remedy, it clearly indicates the Legislature's policy of requiring officers to leave a copy of the warrant, which must recite the basis for its issuance, with the searched party or at the searched premises. **Under the decision in this case, however, there is no consequence for a failure to do so.** n1 Further, under the majority's reasoning, there would similarly be no consequence for a failure to tabulate the property seized, leave a copy of the tabulation with the searched party or at the searched premises, file that tabulation, or safely keep the property seized. n2 Each of these requirements is ministerial in nature and occurs after the search, but each is required by this statute. **Although I would not anticipate police misconduct, n3 even if officers did purposefully ignore this statute's requirements, it apparently would make no difference. Rather than leave the Legislature's policy of requiring police to provide a warrant stating its basis so doubtful, I would exclude the challenged evidence to ensure that the policy is observed.**

Sobczak-Obetts, supra at 779-780. (emphasis added)

In the case now before this Honorable Court, unlike the others in which search warrant statutory violations have been held to be merely "ministerial" or "procedural" in nature – this warrant is invalid on its face. The warrant itself is defective and lacks probable cause. This is not a valid warrant and simply in it issuance or execution proved to be somehow deficient statutorily. The defense maintains based on the above-noted analysis that this warrant lacks probable cause, violates statutory law, clearly violates longstanding case law and violates the Fourth Amendment of the United States

Constitution and Article 1 Section 20 of The Michigan Constitution. The proper remedy in this case was the remedy implemented by the trial court and upheld by the Court of Appeals. As the trial court correctly articulated:

> **It seems to me, therefore, that the warrant is not adequate under the Michigan Constitution, Article One Section Twenty, or the United States Constitution, Amendment Four. And I believe the violation of the Michigan statute, of and by itself, is sufficient to invalidate the warrant.** (23a-24a) (emphasis added)

Defendant-Appellee maintains that the proper remedy to a violation of MCL 780.653; MSA 28.1259 under the circumstances of this case is to affirm the trial court and Court of Appeals' well thought out and supported rulings. To hold otherwise would be to allow the warning of the trial court to become a reality when it held:

> **The Constitution sets forth the right of privacy and security of private homes; and its probably one of the touchstones of the American experience; its one of the things we fought the Revolution over, and if we got rid of the Redcoats, only to have our own people commit the same sort of violations, we really haven't made much progress. (22a) (emphasis added)**

## RELIEF

**WHEREFORE,** for the reasons stated herein, Defendant-Appellee, Christopher Lamar Hawkins, respectfully prays this Honorable Court **DENY** the People's request to reconsider its grant of leave in this case and remand the case to the Court of Appeals regarding the "good faith" issue. Further, that this Honorable Court not hold MCL 780.657; MSA 28.1259(7) and/or MCL 780.658; MSA 28.1259(8) as the proper remedy for the violations in this case but to **AFFIRM** the trial court's and Court of Appeal's ruling and apply the appropriate remedy of suppression of the evidence for the statutory violation of MCL 780.653 or any other remedy this Honorable Court deems appropriate.

Respectfully submitted,

Dated: July 25, 2002

By: _____

Helen C. Nieuwenhuis (P41672)
Attorney for Defendant-Appellant